

OGC 74-2141

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REVIEWED.

13 November 1974

MEMORANDUM FOR: Chief, Africa Personnel

SUBJECT : Foreign Post Differential on Terminal
Leave Payment

REFERENCES : A. OGC 73-1744, dtd 19 Sept 73, Same Subject
B. Memo to OGC fm C/AF/Pers, thru SSA/DDA,
undtd, Same Subject

1. Reference A discusses the inclusion of the foreign post differential in an employee's lump sum leave payment incident to an employee's separation from Federal service at a foreign differential post. The inclusion of the differential in an employee's lump sum leave payment is dependent upon the differential being additional pay and not in the nature of a reimbursement for expenses incurred. An employee must be physically at his or her duty post on the date of separation in order to receive the foreign post differential in his or her lump sum leave payment. Reference B asks this Office to clarify the definition of "duty post" as used in Reference A. The specific question is whether "duty post" is an employee's permanent post of assignment (PCS) or whether it includes a temporary duty (TDY) assignment to a foreign differential post while the employee is, in fact, permanently assigned to Headquarters or any other non-differential post.

2. It is understood that Africa Division has a number of employees assigned to Headquarters who are required to travel to various Stations in Africa to assist these Stations during the absence of certain of their permanently assigned personnel. These employees may be on TDY assignments for as much as 20 out of every 24 months. One of these employees has indicated a desire to retire in December 1974. The employee is TDY [] has been there for over 42 days, and is now receiving the 25 per cent post differential authorized for that post in the Standardized Regulations (Government Civilians, Foreign Areas). It is also understood that you are prepared to return the

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employee to Headquarters for retirement processing; however, if the post differential would be included in the lump sum leave payment, you may let the employee retire [] It is presumed by this Office that the complete retirement processing can be done while the employee is in the field.

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3. The undersigned has spoken to an attorney in the Office of General Counsel, General Accounting Office, and learned that the Comptroller General opinion of June 28, 1973 (B-178428) has never been cited in a subsequent Comptroller General decision or elaborated upon in any manner, including by informal, verbal comments. As the matter stands, this Office finds no authority for paying the differential in a lump sum leave payment to an employee on TDY assignment who separates at an overseas post. The 1973 opinion of this Office (Reference A) indicated that the Department of State was going to amend 3 Foreign Affairs Manual (FAM) 372 to bring it in line with the Comptroller General decision. According to a senior member of the Department's Allowances Staff, who read to me the proposed amendment to 3 FAM 372, the new regulation contains no phraseology which can be construed to include a TDY assignment within its coverage. A member of the Department's Legal Advisor's Office, Mr. Paul Coran, agrees that in the case of a TDY employee, his or her permanent duty station is the deciding factor in determining whether he or she receives a differential in the lump sum leave payment.

4. It is noteworthy that the Department's proposed regulation for the Foreign Service, which has been agreed to by representatives of the Foreign Service employees' union, seems to discourage separations overseas for PCS employees. It provides that an employee who is separated at a differential post must be physically present at the post on his or her date of separation, must not be in a salary status while traveling back to the United States (or elsewhere), must not be brought in for "consultation" at the Department upon return to the United States, and must have a medical examination before the date of separation. (It is understood that without this examination, an employee may not be eligible to apply for a disability retirement /either immediately or within the allowed time/ or be eligible to remain covered under one of the employer's health insurance plans.)

5. We believe that an adoption of the Department regulation when issued and possibly a policy decision on the matter of retirement at a differential post, perhaps at the level of the Associate Deputy Director for Operations, may eliminate most questions concerning this subject. This Office would have no legal objection to a decision that it is the policy of the Directorate for Operations that its employees be required to return to Headquarters on PCS orders for retirement processing. There are several factors the Directorate may wish to consider. First, we have found no authority which indicates that employees have a legal "right" to retire at a differential post. Employees should only be allowed to retire at a differential post if it is determined that it is in the interest of the Government for them to do so. For example, if an employee's retirement home is to be overseas, or if the employee plans to travel overseas, it may not be in the Government's best interest to require him or her to return to Headquarters on PCS orders. Second, there is the factor of money in an era of shrinking budgets. An employee's lump sum leave payment would increase from 10 to 25 percent, depending on the country of assignment. In addition, the ceiling on the number of hours of leave an employee can accumulate and be paid for has been lifted, in certain circumstances, due to the rather generous provisions of a recent statute (P.L. 93-181) [redacted] in preparation).

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[redacted]
Assistant General Counsel

cc: D/Fin
D/Pers
SSA/DDA
C/DDO/CMG
C/Travel Policy Committee

OGC: AEG: cap
Original - Addressee
1 - OGC Subj: ALLOWANCES
1 - AEG Signer
✓ Chrono

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